UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-

Caption [use short title]

British Airways, Plc
Defendant-Petitioner,

v.

Russel Dover, Henry Horsey, Cody Rank and Suzette Perry, et al.,
Plaintiffs-Respondent

Motion for: Petition for Permission to Appeal

Set forth below precise, complete statement of relief sought:

Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, Petitioner seeks permission to appeal from the district court's April 4, 2017 order certifying the class action.

MOVING PARTY: British Airways, Plc
☐ Plaintiff ☑ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Russel Dover, et al.

MOVING ATTORNEY: Richard Hans

OPPOSING ATTORNEY: David Stellings

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Court-Judge/Agency appealed from: Hon. Raymond J. Dearie, U.S. District Court for the Eastern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: [signature] **Date:** 4/18/17

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17-________

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RUSSEL DOVER, HENRY HORSEY, CODY RANK, and SUZETTE PERRY, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondent,

—against—

BRITISH AIRWAYS PLC (UK),

Defendant-Petitioner.

ON PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, JUDGE RAYMOND J. DEARIE, CASE NO. 1:12-CV-05567 RJD-MDG

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

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CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner, British Airways PLC, by its undersigned attorneys, pursuant to rule 26.1 of the Federal Rules of Appellate Procedure, certifies that: (1) International Consolidated Airlines Group, S.A. ("IAG") is the parent corporation of British Airways; and (2) Qatar Airways (Q.C.S.C.) and Capital Research and Management Company each own ten percent or more of the stock of IAG.

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INTRODUCTION

British Airways Plc ("BA") entered into a contract with members of its Executive Club ("EC"), BA's frequent flyer program (the "EC Contract"), which provides that BA may charge a fuel surcharge and requires the plaintiffs to pay it. Beginning in 2004, BA imposed a fuel surcharge to defray its then-increasing fuel costs. But, BA's fuel surcharge never recovered even half of its massive fuel costs. (R. A-675-76.)

English law, which governs the EC Contract, gave BA the discretion to set the fuel surcharge level as long as BA acted honestly, in good faith, and rationally having regard to the fuel surcharge's purpose, which was to defray fuel costs. The plaintiffs do not claim that BA acted dishonestly or in bad faith. (R. A-1043.)

The putative class period spans over six years and encompasses more than 168,000 putative class members who bought 605,920 tickets on 38,771 routes. (R. A-472, A-714.) During those 2,351 days: BA's fuel costs varied; the spot price of fuel (which varies from BA's cost due to currency and hedging fluctuations) moved continuously; the fuel surcharge went up, and down; the structure of the fuel surcharge changed, increasing in complexity over time; the composition of the group who set the fuel surcharge varied; and the factors on which any particular fuel surcharge decision was based—other than the price or cost of fuel—may have changed. (R. A-1147-52.)

Despite these individualized issues, and the fact that there is no dispute that BA was contractually entitled to impose some level of fuel surcharge, the plaintiffs' experts claimed that they could prove, using "generalized proof", that every single fuel surcharge dollar charged was not "as a matter of economics" a fuel surcharge. The only "proof" proffered was their experts' opinions, which BA challenged under *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993). Among other things, BA moved to exclude the plaintiffs' damages expert because: (1) the EC Contract and English law do not require BA to set a fuel surcharge as defined by a paid expert in hindsight "as a matter of economics"; (2) he did not establish that the plaintiffs paid more in fuel surcharge than the EC Contract allowed; (3) he failed to conduct a statistical analysis and, in his first two reports, he did not cite any economic treatise, peer-reviewed publication, journal or other literature; and (4) his damages models do not comport with English law, industry practice, or reality. (*See generally* R. A-819-49.)

Because the plaintiffs' ability to prove their case was predicated solely on their experts, resolution of the *Daubert* issues was critical to determining whether the plaintiffs could meet their burden to demonstrate predominance. But, the district court did not mention, much less perform, a *Daubert* analysis.

Whether such an analysis is necessary prior to class certification "is the type of question that Rule 23(f) was designed to address . . . ." *Am. Honda Motor Co.*

Inc. v. Allen, 600 F.3d 813, 815-816 (7th Cir. 2010) (holding on interlocutory appeal that when an expert's report "is critical to class certification, as it is here, a district court must perform a full *Daubert* analysis before certifying a class if the situation warrants."); *see also In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (same); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (holding on interlocutory appeal that the district court should not have just found expert evidence admissible, but should have examined the merits to decide *Daubert* issues); *Sher v. Raytheon Co.*, 419 Fed. Appx. 887, 889-891 (11th Cir. 2011) (holding on interlocutory appeal that the district court erred "by not sufficiently evaluating and weighing conflicting expert testimony").

Respectfully, this Court should accept this appeal to clarify that courts within this Circuit must resolve *Daubert* challenges before deciding class certification, particularly when such issues are critical to class certification. Permitting this case to proceed to trial, based solely upon unreliable and faulty expert testimony, would unnecessarily and unfairly impose huge costs on BA.

Review is further warranted here because the district court erred as a matter of law when it concluded that the plaintiffs' experts could (or even did) provide "generalized proof" that BA breached the EC Contract. Because it is undisputed that BA is permitted to impose a fuel surcharge, the payment of a fuel surcharge—in and of itself—does not establish a breach of contract. For that reason, it was insufficient for the district court to find numerosity was met simply by reference to the number of BA EC members who paid a fuel surcharge. The rigorous analysis mandated by the Supreme Court before certifying a class demands more.

QUESTIONS PRESENTED

Whether this Court should grant BA's petition to appeal the order granting class certification, entered on April 4, 2017 (the "Order"), specifically:

1. Where the plaintiffs' claim that generalized proof predominated was predicated solely on the opinions of their experts, did the district court err when it failed to conduct a *Daubert* analysis prior to ruling on the motion for class certification?

2. Did the district court err when it found that individualized issues did not predominate, thus defeating class certification?

3. Did the district court err when it found the putative class sufficiently numerous absent evidence that the four named plaintiffs, much less the entire putative class, had been injured by the defendant's alleged breach of contract?

STATEMENT OF THE CASE

The EC Contract, which is governed by English law, explicitly confers on BA the discretion to set the fuel surcharge. (R. A-1424.) While the EC Contract does not define the term "fuel surcharge", the district court held that its "plain meaning" "is a supplemental charge that is reasonably related to or based upon the cost or price of fuel" and "an added charge imposed by an airline in order to defray rising fuel costs." (R. A-367.)

The EC Contract does not contain any express contractual limitation on BA's power to impose a fuel surcharge. Under English law, "BA [was] under an implied duty to act honestly, in good faith and rationally having regard to the presumed purpose of a fuel surcharge." (R. A-60.) Rationally means "there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse." (R. A-77-78 (quoting *Hayes v. Willoughby*, [2013] 1 WLR 935).)

BA introduced a fuel surcharge in 2004 to defray rapidly rising fuel costs. (R. A-1143, A-649, A-571-73.) During the 2,351 day putative class period, BA made dozens of decisions to increase, decrease, or hold steady the fuel surcharge. Each such decision reflected the fuel prices, hedging positions, currency exchange rates, future forecasts, and trends at that moment in time. (R. A-226-325.) There were dramatic variations in fuel prices during that period. (R. A-552-55.) Each resulting fuel surcharge necessarily had its own distinct relationship to BA's fuel costs, which needs to be assessed. This analysis is individualized and complex, for example:

- The fuel surcharges assessed varied based on the route, the sector length, and the cabin class ticketed. (R. A-1145, A-1157-58.)

- The named plaintiffs bought their tickets at different points during the putative class period, for different routes, in different cabin classes, and paid different fuel surcharges. (R. A-671, A-570, A-596-97.)

- The fuel surcharge was applied at ticketing, but EC members may not have flown and paid it until up to 355 days later. BA could not anticipate, 355 days before a flight, what its actual fuel costs would be on that flight. Rather, BA's future fuel costs were unknowable and impacted by a number of variables. This also created a lag effect, which must be considered in evaluating the charge as compared to the spot price of fuel at any given time. (R. A-647-48, A-1452, A-1144.)

Indeed, at oral argument on the motions for class certification, summary judgment and *Daubert*, the district court observed,

> There were times when the fuel was going through the roof and the airlines, all the airlines decided that they needed to, rather than raise the ticket price for whatever reason, they needed to recoup some, sometimes all and sometimes less than all, of that cost. I do not have any problem with that, but this dispute here it strikes me as much more singular and narrow. That is, you have each given I think there are, what 45 decisions, something like 45 decisions over the class period. Maybe four or five of them did not involve an increase, the rest were either an increase or maintained. When those decisions were made what were the factors that went into it?

(R. A-1070.)

In an effort to establish that BA's fuel surcharge was not a "genuine" fuel surcharge (whatever that means), the plaintiffs proffered two experts, Dr. Jonathan Arnold and Robert Kokonis. (R. A-420-534, A-369-419.) BA submitted rebuttal expert reports. Dan Kasper, an aviation industry expert, opined that the fuel surcharge was reasonable. (R. A-588.) BA's economics expert, Andrew K.G. Hildreth, PhD, performed "statistical (econometric) analyses on the relationship between BA's fuel surcharges and the cost or price of fuel" and, as a result, opined "there is a high degree of correlation" between the two variables. (R. A-616, A-626.) BA's damages expert, Marc Sherman, compared fuel price movement over time with BA's fuel surcharges and found a reasonable relationship between the two. (R. A-656-74.) Michael Crane QC, an English barrister, opined on English law. (R. A-55-109.)

The parties submitted competing *Daubert* motions. (R. A-717-960). The plaintiffs moved for class certification on October 1, 2015 (R. A-961-85), which BA opposed. On December 17, 2015, BA moved for summary judgment and the plaintiffs later cross moved. (R. A-19-54, A-110-43.) On June 28, 2016, the district court heard oral argument on the parties' *Daubert* motions, the plaintiffs' motion for class certification, and the parties' cross motions for summary judgment. (R. A-1050-1141.) On April 4, 2017, the Order was entered granting class certification. (R. A-1-18.)

RELIEF SOUGHT

Pursuant to Rule 5 of the Federal Rules of Appellate Procedure and Rule 23(f) of the Federal Rules of Civil Procedure, BA respectfully seeks permission to appeal from the Order.

APPLICABLE STANDARD OF REVIEW

Rule 23(f) empowers this Court to "permit an appeal from an order granting or denying class-action certification." Fed. R. Civ. P. 23(f). Petitions should be granted where, as here, "the certification order implicates a legal question about which there is a compelling need for immediate resolution." *In Re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001). Failure to resolve factual disputes relevant to Rule 23(b)(3)'s requirement of predominance is legal error subject to *de novo* review. *Cuevas v. Citizens Fin. Grp., Inc.*, 526 Fed. Appx. 19, 20 (2d Cir. 2013) (decertifying a class where the court erred "in failing to resolve factual disputes relevant to Rule 23[b(3)]'s [predominance] requirement.").

REASONS FOR GRANTING INTERLOCUTORY REVIEW

I. The Petition Should Be Granted to Clarify that A District Court Must Conduct A *Daubert* Analysis At the Class Certification Stage When the Expert Opinions Are Critical to Support a Finding of Predominance.

"Rule 23 does not set forth a mere pleading standard", a "party seeking class certification must affirmatively demonstrate his compliance with the Rule", and the Court must perform a "rigorous analysis that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-351 (2011). The plaintiffs "must establish [Rule 23's] requirements by a preponderance of the evidence." *Pa. Pub. Sch. Emp.'s Ret. Sys. v. Morgan Stanley & Co., Inc.*, 772 F.3d 111, 119 (2d Cir. 2014). "A court must 'probe behind the pleadings before coming to rest on the certification question,' satisfying itself that Rule 23 compliance may be demonstrated through 'evidentiary proof.'" *Johnson v. Nextel Comnc'ns Inc.*, 780 F.3d 128, 138 (2d Cir. 2015) (quoting *Comcast Corp. v. Behrend*,133 S.Ct. 1426, 1432 (2013)).

To meet this exacting standard, other Courts of Appeal have held that a district court must first rule on *Daubert* challenges prior to ruling on class certification. The Seventh Circuit, for example, held that "when an expert's report or testimony is critical to class certification . . . [a] district court must perform a full *Daubert* analysis before certifying the class . . . ." *Am. Honda*, 600 F.3d at 815-816. The Eleventh Circuit likewise held that a "district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification." *Sher*, 419 Fed. Appx. at 891 (reversing district court's failure to rule on challenge to expert testimony). And, in *Ellis*, the Ninth Circuit vacated a district court's finding of commonality where the district court found only that expert evidence was admissible, but it "failed to resolve the critical factual disputes" underpinning the *Daubert* challenge. 657 F.3d at 983-84.

Similarly, the Third Circuit held that "a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *In re Blood Reagents*, 783 F.3d at 187. In so doing, the Third Circuit explained that the party seeking class certification must establish that the requirements of Rule 23(a) are "in fact" met and "must also satisfy through evidentiary proof" one of the provisions of Rule 23(b). *Id.* "Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact', nor can it establish 'through evidentiary proof' that Rule 23(b) is satisfied." *Id.*; *see also Wal-Mart*, 564 U.S. at 354 ("The district court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so.")[1]

This Court has not yet definitively ruled whether district courts must conduct a *Daubert* analysis at the class certification stage. In *In re U.S. Foodservice Inc. Pricing Litig.*, this Court noted that it previously "disavowed [its] earlier statement that 'an expert's testimony may establish a component of a Rule 23 requirement simply by not being fatally flawed'", but recognized that it had not decided "whether or when a *Daubert* analysis forms a necessary component of a district court's rigorous analysis." 729 F.3d 108, 129-130 (2d Cir. 2013) (discussing *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006)). This Court further held that it did not need to reach that question in *In re U.S. Foodservice* because the district court there made the necessary *Daubert* findings. *Id.*

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[1] The Eighth Circuit affirmed a district court's focused *Daubert* inquiry "which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence" in *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613-14 (8th Cir. 2011).

Many district courts within this Circuit have conducted a *Daubert* analysis at the class certification stage. *See, e.g., Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 55 (S.D.N.Y. 2016) ("Despite the lack of a clear standard on [whether *Daubert* applies at the class certification stage], trial courts in this circuit often subject expert testimony to *Daubert's* rigorous standards insofar as that testimony is relevant to the Rule 23 class certification analysis."); *Hughes v. The Ester C Co.*, 317 F.R.D. 333, 340 (E.D.N.Y. 2016) (denying class certification; the "[c]ourt finds it is proper to apply the *Daubert* standard at the class certification stage"); *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 114-115 (S.D.N.Y. 2015) (analyzing case law and finding more persuasive the rationale for requiring a *Daubert* analysis); *In re Fed. Home Loan Mortg. Corp. Secs. Litig.*, 281 F.R.D. 174, 177 (S.D.N.Y. 2012) (conducting *Daubert* analysis and denying class certification). These courts correctly hold that a *Daubert* analysis is necessary to ensure the requirements of Rule 23 are satisfied, especially when expert reports "constitute a significant part of the evidence supporting [a] certification motion." *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 128 (S.D.N.Y. 2014) (quoting *Comcast*, 133 S. Ct. at 1432).

BA respectfully requests that this Court accept this petition as this appeal will provide this Court the opportunity to clarify the degree to which a *Daubert* inquiry is necessary at the class certification stage. *See Sumitomo*, 262 F.3d at 139

(Rule 23(f) appeal appropriate where it "implicates a legal question about which there is a compelling need for immediate resolution.").

II. The Petition Should Be Granted Since Individualized Issues Predominate.

A. The District Court Framed The Wrong Questions.

When describing the plaintiffs' "plan to use generalized proof" supposedly to demonstrate a contractual breach, the district court cited exclusively to Dr. Arnold's report, which, the court said, would answer, among other things, whether (1) BA's fuel surcharge was not a "genuine fuel surcharge" as "a matter of economics" because it does not bear a "close relationship" to the price or cost of fuel and (2) BA impermissibly relied on BA's "total cost of fuel in 2003-2004" when setting the fuel surcharge. (R. A-13.) These are the wrong questions.

First, nothing in the EC Contract or English law suggests that BA must impose a fuel surcharge "as a matter of economics." Measuring BA's actions "as a matter of economics" is particularly inappropriate because Dr. Arnold did not know whether there is a commonly accepted definition of fuel surcharge in the field of economics, he said that an economic definition of fuel surcharge is not "particularly relevant", and he simply applied the district court's definition of fuel surcharge, which the district court can do itself. (R. A-1169, A-1171.)

Second, the court's statement that if the EC Contract permits BA "to impose a fuel surcharge based on the 2003-2004 baseline figure", then the "Plaintiffs' claims fall together" (R. A-13-14) is perplexing. The evidence established that BA set the fuel surcharge prospectively. (R. A-1150, A-1159-60.)

While BA set the fuel surcharge prospectively, considering its then-current and projected fuel costs, it did a retrospective check against a baseline of the fiscal year when BA introduced the fuel surcharge (2003-2004) to ensure that BA was not over-recovering its fuel costs. (R. A-676-77.) The district court's framing of the issue—whether BA can impose a fuel surcharge **based on** the baseline—is therefore incorrect. And, to the extent that the plaintiffs' argument with BA's baseline is that it became less relevant over time, its appropriateness necessarily differs during the putative class period. There is no common, class-wide proof.

B. The Court Erred in Finding that the Plaintiffs' Expert's Analysis Constitutes "Generalized Proof" and Generates Common Answers.

"What really matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capability of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. In addition, "representative evidence can be used to prove an individual issue on a classwide basis if each class member, in an individual action, could rely on that evidence to prove his individual claim." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1057 (2016) (Thomas, J., dissenting).

Here, the court cited exclusively to Dr. Arnold's report to find that the plaintiffs could proceed with "generalized proof." (R. A-13, citing R. A-453-567, A-488-89.) The analysis on which Dr. Arnold relies, however: (1) is not applicable to prove the claims of the named plaintiffs, much less all putative class members; and (2) is not equally applicable to each fuel surcharge change. Indeed, Dr. Arnold did not analyze the fuel surcharge the named plaintiffs paid or whether BA acted irrationally in any particular instance. (R. A-671-72, A-1201, A-1221.)

Dr. Arnold claimed that, as a "matter of economics", the magnitude of BA's fuel surcharge to the total ticket price (the "Ratio") was unduly high and thus proves that the fuel surcharge was improper. (R. A-459-63.) The EC Contract, however, does not require any particular Ratio. (R. A-59-60, A-1388-1427.) Moreover, Dr. Arnold testified that he did not think that this Ratio was determinative of whether BA charged a true fuel surcharge, or that it was even a factor, and he admitted that there would be some fares of putative class members with low Ratios and some with high Ratios. (R. A-1186-89.) Even if probative, this analysis does not generate generalized proof: the putative class booked 605,920 tickets, on 38,771 route combinations, over a more than six year period, during which BA had millions of fares. (R. A-472, A-714, A-1143.)

The failure of this metric to generate common answers is emphasized by the fact that it is inapplicable to the named plaintiffs: their Ratios ranged from four percent to 15 percent, much lower than the markedly different results that Dr. Arnold derived from focusing upon only low, inapplicable shoulder season fares that are not representative of what the named plaintiffs bought. (R. A-671-72, A-710.) This metric—with its widely disparate results—does not establish class wide liability, injury or damage. This analysis also ignores the fact that BA sets its fuel surcharge on a global basis, not a route by route basis, and BA's fuel surcharge during the putative class period **only recovered 46 percent** of BA's fuel costs. (R. A-675, A-1144.) And, on each of the named plaintiffs' flights, BA did not collect more in fuel surcharge than its fuel cost. (R. A-596-97.)

Similarly, Dr. Arnold opined that the fuel surcharge was not a fuel surcharge because BA did not always change its fuel surcharge quarterly, including when the spot price of fuel changed. (R. A-453-54.) This is a curious observation given that: (1) the EC Contract does not require BA to change its fuel surcharge quarterly; (2) there is no generally accepted rule that would require BA to change its fuel surcharge quarterly; and (3) Dr. Arnold was not able to name a single airline that reset all of its fares and fuel surcharge every quarter. (R. A-1203-04.) Even if this observation mattered in some way, it does not generate "generalized proof" or common answers: there were quarters where the ending fuel price was higher than the beginning fuel price such that, under the plaintiffs' theory, BA should have increased the fuel surcharge, but BA chose not to do so. (R. A-655-

58, A-1496-1517.) None of the affected putative class members were harmed by BA not raising the fuel surcharge.

In some instances, BA decided to decrease the fuel surcharge, or to increase only charges on long haul (over nine hour) flights but not on short haul flights. For example, on May 2, 2007, BA raised the fuel surcharge because the cost of fuel had increased by 30 percent, but only for long haul routes. (R. A-234-41.) Given the distinction between the treatment of long versus short haul routes, it simply cannot be said that there is a common answer to the question whether that change was appropriate: putative class members who bought a long haul ticket are indisputably affected by that increase differently from putative class members who bought a short haul ticket, to which no fuel surcharge increase was applied. (*Id.*)

Dr. Arnold admitted that he had no evidence to dispute that the May 2, 2007 change—indeed that any individual change—was the result of recent trends in oil prices. (R. A-1215.) The plaintiffs' industry expert, Mr. Kokonis, also admitted that there may have been fuel surcharge changes that related to the cost of fuel, (which would make them contractually permitted), but he has "no idea" how many related to the cost of fuel versus those that he claims did not. (R. A-1304-05.)

In this regard, the plaintiffs' experts are similar to the expert that the Supreme Court found to be insufficient in *Wal-Mart*. 564 U.S. at 355. There, the expert testified that Wal-Mart had a strong corporate culture of gender bias. At his deposition, counsel asked whether this bias affected .5 percent or 95 percent of Wal-Mart's decisions. He did not know. As this was the essential question on which the plaintiffs' claim rested, and the expert "admittedly has no answer to that question, we can safely disregard what he has to say." *Id*. at 2554.

The same result follows here. The plaintiffs' experts have "no idea" how many, if any, fuel surcharge decisions were based on something other than the price or cost of fuel, thus they have not offered "generalized proof" establishing that all fuel surcharge decisions and charges were unrelated to the cost or price of fuel or otherwise contractually improper. (R. A-1215, A-1304-05.)

Class certification is inappropriate, even in form breach of contract cases, where, as here, "individual inquiries [are] required to determine whether a breach of the contract could be found." *Jim Ball Pontiac-Buick-GMC, Inc. v. DHL Express (USA), Inc.*, 2011 WL 815209, at *6 (W.D.N.Y. Mar. 2, 2011) (denying class certification); *Spagnola v. Chubb Corp.*, 264 F.R.D. 76 (S.D.N.Y. 2010) (same), *aff'd.*, 531 F. Appx. 93 (2d Cir. 2013); *Masokowitz v. La Suisse, Societe D'Assurances Sur La Vie*, 282 F.R.D. 54, 62 (S.D.N.Y. 2012) (same); *Rapp v. Green Tree Servicing, LLC*, 302 F.R.D. 505, 508 (D. Minn. 2014) (same); *O'Gara v. Countrywide Home Loans, Inc.*, 282 F.R.D. 81, 90-91 (D. Del. 2012) (same). In *Rapp*, for example, the plaintiff claimed that the defendant breached a mortgage contract by charging him an amount in "force-placed insurance" that exceeded the actual cost of such insurance. 302 F.R.D. at 508. The *Rapp* court found that "it is an oversimplification to say that because each class member's breach of contract claim turns on the meaning of the phrase 'cost of the insurance,' . . . each class member's claim will be factually similar." 302 F.R.D. at 508, 510. Rather, "questions that would require individual adjudication would substantially predominate" over common questions. *Id.* at 510. So too here.

III. The Petition Should Be Granted Because the District Court Improperly Found Numerosity.

Even though the district court recognized that it "'must resolve material factual disputes relevant to each Rule 23 requirement,' and must find that each requirement is 'established by at least a preponderance of the evidence'", the court failed to do either. (R. 4 (quoting *In re U.S. Foodservice*, 729 F.3d at 117).) Instead, it improperly found that the "merits of Plaintiffs' case are separate" from numerosity and simply assumed that the fact that there are 168,259 people in the database of EC members who paid a fuel surcharge necessarily means that each of them paid a fuel surcharge that was in breach of the EC Contract. (*Id.*)[2]

More is required than the existence of theoretically harmed individuals to find numerosity; "a plaintiff cannot rely on 'pure speculation or bare allegations' in order to demonstrate numerosity." *Spread Enter. Inc. v. First Data Merchant Servs. Corp.*, 298 F.R.D. 54, 67, 71-72 (E.D.N.Y. 2014) (putative class members "may not share the Plaintiffs' breach of contract claim"); *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 145 (E.D.N.Y. 2012) (no numerosity); *Scaggs v. NY State Dep't of Educ.*, 2009 WL 890587, at *4 (E.D.N.Y. Mar. 31, 2009); *Jones v. Sterling Infosystems, Inc.*, 317 F.R.D. 404, 413 (S.D.N.Y. 2016) (same); *see also Southwell v. Mortg. Investors Corp. of Ohio, Inc.*, 2014 WL 3956699, at *4 (W.D. Wash. Aug. 12, 2014) (same).

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[2] The district court committed additional errors of law in the Order, such as its findings regarding commonality, typicality and adequacy and the impact of BA's affirmative defenses. BA does not have the space to address all of those failures in this petition, but reserves the right to raise all of those issues should this Court accept this appeal.

In *Scaggs*, for example, the plaintiffs alleged that a school operator violated statutory requirements by depriving them of their right to a free public education. 2009 WL 890587, at *2-3. The Court held that "[t]he mere fact that there are, or were, presumably more than 40 students enrolled in schools managed by defendant Edison in the US from 2001 to present is not enough to establish numerosity where plaintiffs have failed to demonstrate that even a single one of them suffered the same alleged injuries as plaintiffs. The court finds that plaintiffs have failed to satisfy the numerosity requirement." *Id.* at *4; *see also Alix v. Wal-Mart Stores, Inc.*, 16 Misc. 3d 844, 848 (N.Y. Sup. Ct. Albany Cnty. 2007) ("It is settled law in New York that the numerosity requirement can only be met by a proposed class of individuals who have been aggrieved by the conduct forming the basis for the complaint.") Judge Dearie did not distinguish any of this authority.

The EC Contract expressly allows BA to charge a fuel surcharge. (R. A-1398, A-1406.) The mere payment of a fuel surcharge therefore is not, in and of itself, a contractual breach. Rather, for any member of the putative class to be injured, the plaintiff must demonstrate that he or she actually paid a fuel surcharge that deviated from one permitted by the EC Contract. No one has done so. (R. A-1221-24, A-1301-02.) Indeed, it is undisputed that certain of the individuals in BA's database did not pay the fuel surcharge at all. Under BA's Reward Flight Saver Program, which began in November 2011, EC members paid only £35 on certain short haul flights in Europe to cover all taxes, fees, and fuel surcharges rather than the otherwise applicable fuel surcharge amount. (R. A-570, A-1158.) Under the Order, each of those individuals are members of the class *even though they did not even pay the then-applicable fuel surcharge.* That is clear error.

CONCLUSION

For all of the foregoing reasons, this Court should grant BA's petition for leave to appeal and vacate the district court's Order certifying a class.

Dated: New York, New York
April 18, 2017

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CERTIFICATE OF SERVICE

17-___

I hereby certify that I caused one copy of the foregoing Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(F) and Appendix to Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(F), Volumes I-VI [FILED UNDER SEAL] to be served on counsel for Plaintiff-Respondent via Electronic Mail and Regular First Class Mail:

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on this 18th day of April 2017.

/s/ Samantha Collins
Samantha Collins